

House Bill 308 (AS PASSED HOUSE AND SENATE)

By: Representatives Ralston of the 7th, Willard of the 49th, Oliver of the 83rd, and Dobbs of the 53rd

A BILL TO BE ENTITLED
AN ACT

To amend Chapter 11 of Title 14 of the Official Code of Georgia Annotated, relating to limited liability companies, so as to amend the "Georgia Limited Liability Company Act"; to provide certain technical corrections to previously enacted legislation; to clarify certain provisions in the existing statute; to make certain provisions consistent with parallel provisions in the Georgia Business Corporations Code; to clarify the provisions governing the operating agreement of a limited liability company and its binding effect; to provide for automatic resignation of a registered agent following the dissolution of a limited liability company; to provide that statutory liability for wrongful distributions is based solely on violations of the statutory limitations on distributions; to reduce the risk of an unintended dissolution of the limited liability company; to limit the rights of judgment creditors of a member to interfere with management or force the dissolution of a limited liability company; to provide for related matters; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Chapter 11 of Title 14 of the Official Code of Georgia Annotated, relating to limited liability companies, is amended in Code Section 14-11-101, relating to definitions relative to limited liability companies, by revising paragraphs (12) and (18) as follows:

"(12) 'Limited liability company' means a limited liability company formed under this chapter ~~by one or more members.~~"

"(18) 'Operating agreement' means any agreement, written or oral, of the member or members as to the conduct of the business and affairs of a limited liability company ~~that is binding upon all of the members. A written operating agreement may provide that a person shall be admitted as a member of a limited liability company, or shall become an assignee of a limited liability company interest or other rights or powers of a member to the extent assigned, and shall become bound by the operating agreement and the provisions of the articles of organization (A) if such person (or a representative~~

~~authorized by such person orally, in writing, or by other action such as payment for a limited liability company interest) executes the operating agreement or any other writing evidencing the intent of such person to become a member or assignee, or (B) without such execution, if such person (or a representative authorized by such person orally, in writing, or by other action such as payment for a limited liability company interest) complies with the conditions for becoming a member or assignee as set forth in the written operating agreement or any other writing and such person or representative requests in writing that the records of the limited liability company reflect such admission or assignment.~~ In the case of a limited liability company with only one member, a writing signed by that member stating that it is intended to be a written operating agreement shall constitute a written operating agreement and shall not be unenforceable by reason of there being only one person who is a party to the operating agreement. A limited liability company is not required to execute its operating agreement and, except as otherwise provided in the operating agreement, is bound by its operating agreement whether or not the limited liability company executes the operating agreement. An operating agreement may provide enforceable rights to any person, including a person who is not a party to the operating agreement, to the extent set forth therein."

SECTION 2.

Said chapter is further amended in Code Section 14-11-203, relating to formation of limited liability companies, by adding a new subsection to read as follows:

"(e) During any period when a limited liability company has any members it may have one or more members."

SECTION 3.

Said chapter is further amended in Code Section 14-11-212, relating to conversion to a limited liability company, by revising subsection (a), paragraph (6) of subsection (b), and paragraph (2) of subsection (c), as follows:

"(a) A corporation, foreign corporation, foreign limited liability company, limited partnership, foreign limited partnership, general partnership, or foreign general partnership may elect to become a limited liability company. Such election shall require (1) compliance with Code Section 14-2-1109.1 in the case of a Georgia corporation, or (2) the approval of all of its partners, members or shareholders (or such other approval or compliance as may be sufficient under applicable law or the governing documents of the electing entity to authorize such election) in the case of a foreign corporation, foreign limited liability company, limited partnership, foreign limited partnership, general partnership, or foreign general partnership."

"(6) A statement setting forth either (A) the manner and basis for converting the ownership interests in the entity making the election into interests as members of the limited liability company formed pursuant to such election or canceling them, or (B)(i) that a written operating agreement has been entered into among the persons who will be the members of the limited liability company formed pursuant to such election, (ii) that such operating agreement will be effective immediately upon the effectiveness of such election, and (iii) that such operating agreement provides for the manner and basis of such conversion or cancellation."

"(2) The ownership interests in the entity making the election shall be converted or canceled on the basis stated or referred to in the certificate of conversion in accordance with paragraph (6) of subsection (b) of this Code section;"

SECTION 4.

Said chapter is further amended in Code Section 14-11-303, relating to liability to third parties, by revising subsection (a) as follows:

"(a) A person who is a member, manager, agent, or employee of a limited liability company is not liable, solely by reason of being a member, manager, agent, or employee of the limited liability company, under a judgment, decree, or order of a court, or in any other manner, for a debt, obligation, or liability of the limited liability company, including liabilities and obligations of the limited liability company to any member or assignee, whether arising in contract, tort, or otherwise, or for the acts or omissions of any other member, manager, agent, or employee of the limited liability company, whether arising in contract, tort, or otherwise. Notwithstanding the provisions of this subsection, a member, manager, or employee may be personally liable for tax liabilities arising from the operation of the limited liability company as provided in Code Section 48-2-52."

SECTION 5.

Said chapter is further amended in Code Section 14-11-311, relating to notice, by revising paragraph (2) as follows:

"(2) Notice may be communicated in person; by telephone, ~~telegraph, teletype,~~ electronic transmission, or other form of wire or wireless communication; or by mail or private carrier. If these forms of personal notice are impracticable, notice may be communicated by a newspaper of general circulation in the area where published or by radio, television, or other form of public broadcast communication;"

SECTION 6.

Said chapter is further amended in Code Section 14-11-408, relating to liability upon wrongful distribution, by revising subsection (a) and paragraph (2) of subsection (b) as follows:

"(a) A member or manager who votes for or expressly consents to a distribution that is made in violation of ~~the articles of organization, a written operating agreement, or~~ Code Section 14-11-407 is personally liable to the limited liability company for the amount of the distribution that exceeds what could have been distributed without violating ~~the articles of organization, written operating agreement, or~~ Code Section 14-11-407, if it is established that such member or manager did not act in compliance with Code Section 14-11-407 and violated a duty owed under Code Section 14-11-305 (without regard to any limitation on such duty permitted by paragraph (4) of Code Section 14-11-305)."

"(2) From each member for the amount the member received knowing that the distribution was made in violation of ~~the articles of organization, written operating agreement, or~~ Code Section 14-11-407."

SECTION 7.

Said chapter is further amended in Code Section 14-11-504, relating to rights of a judgment creditor, by revising subsection (b) as follows:

"(b) The remedy conferred by this Code section shall not be deemed exclusive of others which may exist, including, without limitation, the right of a judgment creditor to reach the limited liability company interest of the member by process of garnishment served on the limited liability company, provided that, except as otherwise provided in the articles of organization or a written operating agreement, a judgment creditor shall have no right under this chapter or any other state law to interfere with the management or force dissolution of a limited liability company or to seek an order of the court requiring a foreclosure sale of the limited liability company interest."

SECTION 8.

Said chapter is further amended in Code Section 14-11-505, relating to admission of members, by revising said Code section as follows:

"14-11-505.

(a) In connection with the formation of a limited liability company, a person ~~acquiring a limited liability company interest~~ is admitted as a member of the limited liability company upon the later to occur of:

(1) The formation of the limited liability company; or

(2) The time provided in and upon compliance with the articles of organization or a written operating agreement or, if the articles of organization and any written operating agreement do not so provide, when the person's admission is reflected in the records of the limited liability company.

(b) After the formation of a limited liability company, a person ~~acquiring a limited liability company interest directly from the limited liability company~~ is admitted as a member of the limited liability company at the time provided in and upon compliance with the articles of organization and any written operating agreement or, if the articles of organization or a written operating agreement does not so provide, upon the consent of all members and when the person's admission is reflected in the records of the limited liability company.

(c) An assignee of a ~~limited liability company interest~~ is admitted as a member of the limited liability company upon compliance with paragraph (1) of Code Section 14-11-503 and at the time provided in and upon compliance with the articles of organization and any written operating agreement or, if the articles of organization or a written operating agreement does not so provide, when any such person's permitted admission is reflected in the records of the limited liability company; provided, however, that an assignee shall not be admitted as a member of the limited liability company until such assignee has consented to such admission.

(d) A written operating agreement may provide that a person shall be admitted as a member of a limited liability company, or shall become an assignee of a limited liability company interest or other rights or powers of a member to the extent assigned, and shall become bound by the operating agreement and the provisions of the articles of organization (A) if such person (or a representative authorized by such person) executes the operating agreement or any other writing evidencing the intent of such person to become a member or assignee, or (B) without such execution, if such person (or a representative authorized by such person) complies with the conditions for becoming a member or assignee as set forth in the written operating agreement or any other writing and such person or representative requests in writing that the records of the limited liability company reflect such admission or assignment.

(e) A person may be admitted to a limited liability company as a member of the limited liability company and may receive a limited liability company interest in the limited liability company without making a contribution or being obligated to make a contribution to the limited liability company. Unless otherwise provided in a written operating agreement, a person may be admitted to a limited liability company as a member of the limited liability company without acquiring a limited liability company interest in the limited liability company. Unless otherwise provided in a written operating agreement, a person may be admitted as the sole member of a limited liability company without making

a contribution or being obligated to make a contribution to the limited liability company
or without acquiring a limited liability company interest in the limited liability company.
(f) In the case of a person being admitted as a member of a surviving limited liability
company pursuant to a merger in accordance with Article 9 of this chapter, a person is
admitted as a member of the limited liability company as provided in the operating
agreement of the surviving limited liability company or in the agreement of merger, and
in the event of any inconsistency, the terms of the agreement of merger shall control. In
connection with the conversion into a limited liability company in accordance with Code
Section 14-11-212, a person is admitted as a member of the limited liability company as
provided in the limited liability company agreement."

SECTION 9.

Said chapter is further amended in Code Section 14-11-506, relating to powers of the estate
of a deceased or incompetent member, by revising said Code section as follows:

"14-11-506.

Except as otherwise provided in the articles of organization or a written operating
agreement, if a member who is an individual dies or a court of competent jurisdiction
adjudges him or her to be incompetent to manage his or her person or his or her property,
the member's executor, administrator, guardian, conservator, or other legal representative
has all of the rights of an assignee of all of the member's limited liability company interest.
Except as otherwise provided in the articles of organization or a written operating
agreement, if the last member of a limited liability company dies or a court of competent
jurisdiction adjudges him or her to be incompetent to manage his or her person or his or her
property, the member's executor, administrator, guardian, conservator, or other legal
representative shall become a member of the limited liability company, unless such
executor, administrator, guardian, conservator, or other legal representative elects not to
become a member by written notice given to the limited liability company within 90 days
of such death or adjudication (or within such other period as is provided for in a written
operating agreement)."

SECTION 10.

Said chapter is further amended in Code Section 14-11-602, relating to dissolution, by
revising said Code section as follows:

"14-11-602.

(a) Effective for limited liability companies formed prior to July 1, 1999, a limited liability
company is dissolved and its affairs shall be wound up upon the first to occur of the
following:

- (1) At the time specified in the articles of organization or a written operating agreement;
- (2) Upon the happening of events specified in the articles of organization or a written operating agreement;
- (3) Subject to contrary provision in the articles of organization or a written operating agreement, at ~~At~~ a time approved by all the members;
- (4) Subject to contrary provision in the articles of organization or a written operating agreement, 90 days after any event of dissociation with respect to any member (other than an event specified in paragraph (1) of subsection (b) of Code Section 14-11-601), unless within such 90 day period the limited liability company is continued by the written consent of all other members or as otherwise provided in the articles of organization or a written operating agreement; or
- (5) Entry of a decree of judicial dissolution under subsection (a) of Code Section 14-11-603.

(b) Effective for limited liability companies formed on or after July 1, 1999, a limited liability company is dissolved and its affairs shall be wound up upon the first to occur of the following:

- (1) At the time specified in the articles of organization or a written operating agreement;
- (2) Upon the happening of events specified in the articles of organization or a written operating agreement;
- (3) Subject to contrary provision in the articles of organization or a written operating agreement, at ~~At~~ a time approved by all the members;
- (4) Subject to contrary provision in the articles of organization or a written operating agreement, 90 days after an event of dissociation with respect to the last remaining member, unless otherwise provided in the articles of organization or a written operating agreement; or
- (5) Entry of a decree of judicial dissolution under subsection (a) of Code Section 14-11-603.

(c) Notwithstanding paragraphs (1), (2), (3), and (4) of subsections (a) and (b) of this Code section, the limited liability company shall not be dissolved and its affairs shall not be wound up if, prior to the filing of a certificate of termination in the office of the Secretary of State, either:

- (1) The limited liability company's articles of organization or operating agreement, or both, are amended such that, after giving effect to such amendment, such event does not result in dissolution of the limited liability company pursuant to subsection (a) or (b) of this Code section; or
- (2) If the limited liability company then has at least one member, a decision to continue the limited liability is taken by all of the members of the limited liability company (and

all other persons, if any, with power to require dissolution of the limited liability company under its articles of organization or written operating agreement).

Any amendment or other action contemplated by paragraph (1) or (2) of this subsection shall, to the extent necessary to achieve the purposes of this subsection, be effective as of and from and after the applicable event described in subsection (a) or (b) of this Code section."

SECTION 11.

Said chapter is further amended in Code Section 14-11-610, relating to certificate of termination, by revising said Code section as follows:

"14-11-610.

A dissolved limited liability company ~~shall~~ may deliver to the Secretary of State for filing a certificate of termination when the statements required to be included therein can be truthfully made. Such a certificate of termination shall set forth:

(1) The name of the limited liability company;

(2) That all known debts, liabilities, and obligations of the limited liability company have been paid, discharged, or barred or that adequate provision has been made therefor; and

(3) That there are no actions pending against the limited liability company in any court, or that adequate provision has been made for the satisfaction of any judgment, order, or decree that may be entered against it in any pending action."

SECTION 12.

Said chapter is further amended in Code Section 14-11-901, relating to mergers, by revising subsection (a) as follows:

"(a) Pursuant to a written agreement, which, unless otherwise provided therein, will constitute the plan of merger required by Code Section 14-11-902 if it contains the provisions required by that Code section, a limited liability company may merge with or into one or more business entities with such limited liability company or other business entity as the agreement shall provide being the surviving limited liability company or other business entity."

SECTION 13.

Said chapter is further amended in Code Section 14-11-905, relating to effects of merger, by revising paragraphs (7) and (8) of subsection (a) as follows:

"(7) The articles of organization of the surviving limited liability company shall be amended to the extent provided in the ~~plan~~ articles of merger; and

270 (8) The interests or shares in each merging constituent business entity that are to be
271 converted into interests of the surviving limited liability company, or into cash or other
272 property under the terms of the plan of merger, or cancelled, are so converted or
273 cancelled, and the former holders thereof are entitled only to the rights provided in the
274 plan of merger or their rights otherwise provided by law."

275 **SECTION 14.**

276 All laws and parts of laws in conflict with this Act are repealed.